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No.

ALEXANDER L STEVENS  
CLERK**In the Supreme Court**

OF THE

**United States****OCTOBER TERM, 1984**

**PEOPLE OF THE STATE OF CALIFORNIA AND  
PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA, et al.,  
*Petitioners,***

VS.

**FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,  
*Respondents.***

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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JANICE E. KERR\*

General Counsel

J. CALVIN SIMPSON

Assistant General Counsel

GRETCHEN DUMAS

Principal Counsel

PEOPLE OF THE STATE OF

CALIFORNIA AND THE

PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

350 McAllister Street

San Francisco, CA 94102

\**Counsel of Record*

Telephone: (415) 557-0470

DAVID E. BLABEY  
General Counsel  
LAWRENCE G. MALONE  
Counsel  
DEPARTMENT OF PUBLIC SERVICE  
OF THE STATE OF NEW YORK  
Three Empire State Plaza  
Albany, New York 12223

FRANK J. KELLEY  
Attorney General  
LOUIS J. CARUSO  
Solicitor General  
DON L. KESKEY  
LEO H. FRIEDMAN  
Assistant Attorney General  
THE STATE OF MICHIGAN AND  
MICHIGAN PUBLIC SERVICE  
COMMISSION  
1000 Long Boulevard, Suite 11  
Lansing, Michigan 48910

LYNDA S. MOUNTS  
CADWALADER, WICKERSHAM & TAFT  
1333 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
*Of Counsel*

WILLIAM PAUL RODGERS, Jr.  
General Counsel  
CHARLES D. GRAY  
Assistant General Counsel  
GENEVIEVE MORELLI  
Deputy Assistant  
General Counsel  
NATIONAL ASSOCIATION OF  
REGULATORY UTILITY  
COMMISSIONERS  
1102 ICC Building  
Post Office Box 684  
Washington, D.C. 20044

JOEL B. SHIFMAN  
Attorney  
PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
State Capitol  
Charleston,  
West Virginia 25305

JACK SHREVE  
Public Counsel  
OFFICE OF THE PUBLIC COUNSEL  
202 Blount Street, Room 624  
Tallahassee, Florida 32301

STEVEN W. HAMM  
Consumer Advocate for the  
State of South Carolina  
RAYMOND E. LARK, Jr.  
Assistant Consumer Advocate  
SOUTH CAROLINA DEPARTMENT  
OF CONSUMERS AFFAIRS  
2801 Devine Street  
Columbia,  
South Carolina 29250

**SUSAN W. RESTER**  
Special Assistant  
Attorney General  
**MINNESOTA DEPARTMENT OF**  
PUBLIC SERVICE  
1102 Bremer Tower  
7th & Minnesota  
St. Paul, Minnesota 55101

**DAVID LYNCH**  
Assistant General Counsel  
**IOWA STATE COMMERCE**  
COMMISSION  
1350 New York Ave., N.W.,  
No. 1023  
Washington, D.C. 20003

**BRIAN MOLINE**  
General Counsel  
**JAMES FLAHERTY**  
Attorney  
**KANSAS STATE CORPORATION**  
COMMISSION  
State Office Building  
Topeka, Kansas 66612

**HOWARD C. DAVENPORT**  
General Counsel  
**LLOYD N. MOORE, JR.**  
**MOORE & HICKS**  
1250 Eye Street, N.W., No. 201  
Washington, D.C. 20005  
Attorneys for Public Service  
Commission of the District  
of Columbia

**STEVEN SCHUR**  
Chief Counsel  
**JON KINGSTAD**  
Assistant Chief Counsel  
**WISCONSIN PUBLIC SERVICE**  
COMMISSION  
Post Office Box 7854  
Madison, Wisconsin 53707

**ROBERT WALDRUM**  
Attorney  
**ARKANSAS PUBLIC SERVICE**  
COMMISSION  
1000 Center  
P.O. Box C-400  
Little Rock, Arkansas 72202

**KENNETH O. EIKENBERRY**  
Attorney General  
**LARRY V. ROGERS**  
Assistant Attorney General  
**WASHINGTON UTILITIES AND**  
TRANSPORTATION COMMISSION  
Highways-Licenses Building  
Olympia, Washington 98504

**IRWIN I. KIMMELMAN**  
Attorney General of  
New Jersey  
By **ALAN S. PRALGEVER**  
Deputy Attorney General  
for the New Jersey Board of  
Public Utilities  
Division of Law  
1100 Raymond Blvd., No. 316  
Newark, New Jersey 07102

**JOSEPH I. LIBERMAN**  
Attorney General  
**WILLIAM B. GUNDLING**  
Assistant Attorney General  
**PETER J. JENKELUNAS**  
Assistant Attorney General  
**DEPARTMENT OF PUBLIC UTILITY**  
CONTROL/STATE OF  
CONNECTICUT  
1 Central Park Plaza  
New Britain, Connecticut 06051

**QUESTION PRESENTED**

Has the Federal Communications Commission exceeded its authority to regulate interstate communications under Sec. 151 of the Communications Act, 47 U.S.C. Sec. 151, by preempting state authority to regulate the prescription of intrastate depreciation rates used in the setting of intra-state telephone rates?

## **LIST OF PARTIES**

People of the State of California and the Public Utilities Commission of the State of California  
 Virginia State Corporation Commission  
 Federal Communications Commission and United States of America  
 North American Telephone Company  
 Florida Public Service Commission  
 State of Michigan and Michigan Public Service Commission  
 Department of Public Utility Control of the State of Connecticut  
 National Association of Regulatory Utility Commissioners  
 Southern Pacific Communications Company  
 Public Service Commission of the District of Columbia  
 Public Utilities Commission of Ohio  
 Arkansas Public Service Commission  
 Kansas State Corporation Commission  
 GTE Service Corporation  
 Public Service Commission of Wyoming  
 Continental Telecom Inc.  
 Washington Utilities and Transportation Commission  
 United Telephone System, Inc.  
 Department of Public Service of the State of Minnesota  
 Arizona Corporation Commission  
 Cincinnati Bell Inc.  
 Citizens of the State of Florida, Office of Public Counsel  
 National Association of State Utility Consumer Advocates  
 Consumer Advocate of South Carolina  
 Office of Consumers' Counsel for the State of Ohio  
 Iowa State Commerce Commission

Public Service Commission of Wisconsin  
 Public Service Commission of West Virginia  
 New York State Department of Public Service  
 The Bell Telephone Company of Pennsylvania  
 The Chesapeake and Potomac Telephone Company  
 The Chesapeake and Potomac Telephone Company of Maryland  
 The Chesapeake and Potomac Telephone Company of Virginia  
 The Chesapeake and Potomac Telephone Company of West Virginia  
 The Diamond State Telephone Company  
 Indiana Bell Telephone Company, Incorporated  
 Michigan Bell Telephone Company  
 The Mountain States Telephone and Telegraph Company  
 New England Telephone and Telegraph Company  
 New Jersey Bell Telephone Company  
 New York Telephone Company  
 Northwestern Bell Telephone Company  
 The Ohio Bell Telephone Company  
 Pacific Northwest Bell Telephone Company  
 The Pacific Telephone and Telegraph Company  
 Bell Telephone Company of Nevada  
 South Central Bell Telephone Company  
 Southern Bell Telephone and Telegraph Company  
 The Southern New England Telephone Company  
 Southwestern Bell Telephone Company  
 Wisconsin Telephone Company  
 Board of Public Utilities of New Jersey  
 Louisiana Public Service Commission

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**PETITION FOR A WRIT OF CERTIORARI  
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Petitioners the People of the State of California and the Public Utilities Commission of the State of California (California), New York State Department of Public Service, State of Michigan and Michigan Public Service Commission, National Association of Regulatory Utility Commissioners, Public Service Commission of West Virginia, Citizens of the State of Florida—Office of the Public Counsel, Consumer Advocate of South Carolina, Department of Public Service of the State of Minnesota, Iowa State Commerce Commission, Kansas State Corporation Commission, Public Service Commission of the District of Columbia, Public Service Commission of Wisconsin, Arkansas Public Service Commission, Washington Utilities and Transportation Commission, Board of Public Utilities

of New Jersey, and Department of Public Utilities Control of the State of Connecticut respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 18, 1984.

#### **OPINION AND ORDERS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit is set forth in Appendix A. The Federal Communications Commission's (FCC) December 22, 1982 Order preempting state prescription of depreciation rates is set forth in Appendix A. The FCC's April 27, 1982 Order which found that the FCC could not preempt state prescription of depreciation rates is set forth in Appendix A.

#### **JURISDICTION**

The Court of Appeals entered judgment on June 18, 1984. The Court of Appeals denied rehearing on October 3, 1984 (See Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### **STATUTORY PROVISIONS INVOLVED**

Relevant statutory provisions are set forth in Appendix B.

#### **STATEMENT OF THE CASE**

##### **I**

#### **STATEMENT OF FACTS**

In 1934 Congress enacted the Communications Act (Act), 47 U.S.C. 151 et seq. in which a dual federal state regulatory scheme was established. The Federal Communications Commission (FCC) regulates the interstate network and the states, the intrastate network. Sections 152(b), 47 U.S.C. § 152(b), and 221(b), 47 U.S.C. § 221(b), expressly

restrict the federal government from regulating the entire national network by preserving the states' intrastate jurisdiction. Specifically, they provide that, apart from radio licensing, "nothing in this act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." [47 U.S.C. § 152(b)], or ". . . in connection with . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communications". 47 U.S.C. § 221(b). Based on this reservation of jurisdiction to the states, state regulatory agencies have been prescribing intrastate depreciation expenses for regulated telephone companies for the last 50 years as part of their obligation to set intrastate rates. Under well established ratemaking principles states seek to prescribe rates that cover all intrastate operating expenses plus a fair rate of return on the rate base devoted to intrastate service. Depreciation expenses make up a significant percentage of the revenue requirement which the rates paid by intrastate customers are intended to satisfy.<sup>1</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934); *Smith v.*

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<sup>1</sup>Until the instant case, the depreciation rates were set by grouping individual pieces of equipment together in units by vintage. Then service lives were set for these units. The setting of service lives was done in a three way meeting between the FCC, the telephone company and the state regulatory agency. State and federal authorities have not always agreed on service lives and have not been bound by these meetings. (See, N.Y. Tel. Co., Opinion 81-3, January 19, 1981.) The state or federal jurisdiction then applied its depreciation methodology to the portion of local plant allocated to it by the separations process. Approximately 75% of the investment in local plant is currently allocated to interstate services and about 25% to intrastate services. Each jurisdiction then came up with a dollar figure which was then included as part of the company's revenue requirement.

*Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). Over this 50-year period the FCC has interpreted the Act as allowing the states to prescribe their own depreciation policy for purposes of setting intrastate rates. See FCC April 27, 1982 Order, *In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, Memorandum Opinion and Order*, 89 F.C.C. 1094 (1982) (April Order), rev'd, C.C. Docket No. 79-105, (F.C.C. January 6, 1983).

In the instant case, the FCC has reversed its earlier interpretation of the Act which it articulated as late as April 27, 1982 (See April Order). It now asserts that the task of introducing competitive market concepts into the regulated telecommunications industry necessitates the preempting of all state authorized depreciation and accounting methodologies used in the regulation of intrastate telecommunication services.

## II PROCEEDINGS BELOW

On August 14, 1979, the FCC issued a notice of proposed rulemaking which dealt with changes in accounting and depreciation procedures relating to the expenses incurred in connecting a telephone line to the telephone system. (Station connection account.)<sup>2</sup> On March 31, 1981 (March Order), the FCC issued an Order establishing expensing and amortization rules to replace depreciation procedures that had previously applied to the inside wiring portion of the station connection account.<sup>3</sup>

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<sup>2</sup>*In the matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, Notice of Proposed Rulemaking*, 44 F.R. 48988 (August 14, 1979.)

<sup>3</sup>*In the matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, First Order and Report*, 85 F.C.C.2d 818 (1981).

On April 20, 1981, the People of the State of California and the Public Utilities Commission of the State of California (California) filed a Petition for Reconsideration of this Order and on April 30, 1981 the National Association of Regulatory Utility Commissioners (NARUC) filed a Petition for Clarification. Both Petitions requested the FCC to clarify whether the March Order was intended to preempt states from prescribing depreciation rates and using accounting practices for intrastate communications which differed from those used by the FCC.

The American Telephone and Telegraph Company (AT&T) and GTE Service Corporation responded to these petitions by arguing that Congress had explicitly authorized the FCC to preempt the states under Section 220 of the Communications Act. AT&T and GTE Service Corporation further argued that, in any event, the FCC could prohibit states from relying on their own depreciation or accounting methods on the ground that such action would frustrate the accomplishment of federal policies and objectives.

After receiving comments from a diverse group of interested parties, the FCC issued its April Order, *supra*, in which it found that Section 220 of the Act did *not* authorize the FCC to preempt the states from using their own accounting and depreciation procedures for intrastate rate-making purposes. The FCC also concluded that no valid federal policy would be frustrated if states employed their own accounting and depreciation practices. In this regard, the FCC stated that "if carriers maintain the records we require for purposes of interstate ratemaking, federal regulations would not be frustrated if carriers maintain additional records for other purposes." 89 F.C.C.2d at 1097. The FCC herein acknowledged that states have for years kept separate records.

AT&T and GTE Service Corporation thereupon sought reconsideration of the April Order before the FCC and instituted a proceeding for judicial review in the United States Court of Appeals for the District of Columbia Circuit. *AT&T v. FCC*, Appeal docketed, Case No. 82-1747 (D.C. Cir. 1982) and *GTE Service Corporation v. FCC*, Appeal docketed, Case No. 82-1752 (D.C. Cir. 1982).

In response to the AT&T petition, the FCC reversed its earlier stand and adopted its *Memorandum, Opinion and Order* of December 22, 1982.<sup>4</sup> In that Order, the FCC found state prescription of depreciation rates and accounting practices which are inconsistent with those of the FCC to be preempted by Section 220 of the Communications Act, or, in the alternative, found that inconsistent state depreciation rates would impede the FCC's pro-competition policy and were, thus, preemptive.<sup>5</sup>

A petition for review of the December Order was filed in the Court of Appeals for the Fourth Circuit by the Virginia State Corporation Commission with California and numerous other state parties intervening.<sup>6</sup> The major points raised by the states were that state prescription of depreciation rates for intrastate service did not frustrate federal

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<sup>4</sup>*In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, Memorandum, Opinion and Order*, C.C. Docket No. 79-105, F.C.C. No. 82-581, slip. op. January 6, 1983, 48 Fed. Reg. 2324 (January 18, 1983) (December Order).

<sup>5</sup>After the FCC reversed itself, AT&T and GTE Service Corporation moved to dismiss their appeals. The District of Columbia Circuit granted their motion on March 31, 1983, terminating all pending appeals on the subject in that court. AT&T and GTE Service Corporation subsequently intervened in the instant case in support of the FCC.

<sup>6</sup>See list of parties signing this petition, *supra*.

policy and that Congress in the Act did not clearly and unmistakably preempt the states from determining such rates.

On June 18, 1984, the Fourth Circuit found it unnecessary as a matter of law to determine whether Section 220 of the Act required preemption of the depreciation question by the FCC.<sup>7</sup> Instead, the court upheld the FCC on the ground that preemption was necessary to prevent frustration of the federal purpose contained in the preamble of the Act. 47 U.S.C. § 151.<sup>8</sup> The Court held that preemption was justified because "interstate communications would undoubtedly be affected by the states' imposition of depreciation policy . . .". *Virginia State Corporation Commission v. FCC, et al.*, 737 F.2d 388, 395 (4th Cir. 1984). The court went on to say that this case, unlike other preemption cases which involved jointly used plant, raised

no question of actual physical impossibility of complying with dual federal and state regulation; presumably, the carriers could keep accounts in which its assets would be separately depreciated for intrastate and interstate purposes. Nonetheless, physical impossibility is but one ground for preemption; frustration of federal objectives provides a rationale at least equally valid. Since inconsistent state regulation poses an impediment to the development of interstate facilities, preemption is justified in this case even if "physical impossibility" is not at issue.

At 737 F.2d at 396.

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<sup>7</sup>Arguments related to whether Section 220 clearly and unmistakably calls for preemption will not be discussed in this petition since the Fourth Circuit did not address this point. See FCC's April Order, *supra*, which holds that Section 220 does not preempt state authority. Appendix A

<sup>8</sup>47 U.S.C. Sec. 151 states in part ". . . to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and worldwide wire . . . communication service . . .".

As it made this historic move towards consolidating power in the federal government, the majority seemed less than confident about the true extent of the conflict between federal and state depreciation policies. The court stated that the policy conflict surrounding depreciation rates was "more attenuated than the very direct effect produced by physical connection of equipment to interchangeable lines . . .", 737 F.2d at 395, the situation present in the earlier preemption cases. Obviously, the court was referring to the fact that when separability is possible, as it is in the instant case, much of the potential for conflict is eliminated. Nevertheless, the court found that the FCC's pro-competition policies in the interstate market might possibly be frustrated if states continue to prescribe inconsistent depreciation rates. 737 F.2d at 395.

In contrast, the dissent found that there was no support in the record for the FCC's position and accused the FCC of manufacturing a conflict to justify its preemption of state jurisdiction. 737 F.2d at 398. For example, neither the Fourth Circuit nor the FCC at any time has explained 1) how capital recovery through depreciation mechanisms enhances competition in any particular market; 2) to what market the FCC's concern over competition relates; or 3) what the relationship was between capital recovery in the intrastate market and competition in the interstate market. The dissent concludes, that the FCC's

. . . unsupported and unsupportable statements as to the effect on competition of inconsistent state depreciation methods, do not provide even a modicum of reasoned analysis supporting the FCC's decision to interfere in state ratemaking after several decades of affirmatively espousing the opposite conclusion.

737 F.2d at 399.

## **REASONS FOR GRANTING THE WRIT**

### **I**

#### **THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT**

When Congress enacted the Communications Act, it envisioned a dual federal-state regulatory scheme in which the FCC would regulate the interstate network and the states, the intrastate network. 47 USC §152(b); 47 USC § 221(b). Today, that congressional mandate is at risk. The FCC has taken the position that monopoly power, the basic economic premise which justifies regulation, is being eroded by competition and that a new regulatory scheme, which gives the FCC control over all regulatory policies related to competition for both interstate and intrastate services, must be created. Specifically, the FCC has extended its regulatory reach to the most basic mechanism by which states have regulated intrastate communications over the last 50 years, local rates. Currently, depreciation expenses, the specific issue in this case, make up 10% to 20% of the revenue requirement recovered in intrastate rates. This FCC action is a direct challenge to the jurisdiction reserved to the states under the Act. See 47 U.S.C. § 152(b) and 47 U.S.C. §221(b).

#### **A. There Is No Conflict Between State Depreciation Policies and Federal Policies; the FCC Has Created a Rationale for Preemption Which Will Permit It to Abrogate Completely State Regulation of Intrastate Ratemaking in Violation of the Communications Act**

Historically, states have had exclusive control over the setting of intrastate depreciation rates.<sup>9</sup> Until the instant

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<sup>9</sup>In the process of setting these depreciation rates for intrastate service, states have frequently used a different depreciation methodology from that approved by the FCC for interstate telephone

case the FCC has never found that state deviations from its methodology frustrated federal policy. In fact, nine months before the decision at issue, the FCC itself concluded that no federal policy would be frustrated if state regulators continued their long-established policy of using depreciation and accounting methodologies for ratemaking purposes which differ from those used by the FCC. 89 F.C.C.2d at 1097.

Nine months later in the instant case, the FCC reversed its position and asserted that a conflict between state and federal policy existed and thus preemption was needed. The dissent below found this quick turnaround to be unwarranted by the facts and found that the conflict was "for all practical purposes nonexistent, and has been created by the FCC to rationalize a base for its decision." 737 F.2d at 398.

The dissent supported this position by pointing out the illogic of the FCC stand regarding depreciation. For example, the FCC contended that newly prescribed depreciation methods, which give the carriers more revenue in earlier years, better reflect economic reality and thus will increase market efficiency, encourage technological innovation, and otherwise promote competition. The initial problem that the dissent has with this statement is that the FCC never defines the relevant marketplace. Is the

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companies. *Pacific Telephone & Telegraph Co.*, 401 P. 2d 353, 58 PUR 3d 229, 253-254 (Cal. 1965); *Southern Bell Telephone & Telegraph Co.*, 126 PUR 3d 55, 110 (La. PSC 1958); *In Re Adoption of Depreciation Rule for Telephone Companies*, Order 10190 (Florida PSC 1981); *Accounting Treatment for Donations, Dues and Lobbying Expenditures*, 71 PUR 3d 129, 142, (NY PSC 1987); *New York Telephone Co.*, 20 PUR 3d 129, 143 (NY PSC 1956); *Northwestern Bell Telephone Co.*, 43 N.W. 553, 557 (S.D. 1950); *Southwestern Bell Telephone Co.*, 36 PUR 4th 283, 294 (Mo. PSC 1980).

FCC talking about the interstate market for long distance, the intrastate market for long distance, the equipment market, the local service market or some other market? The FCC also never offers any support for the proposition that there is a connection between capital recovery through depreciation rates and the creation of competition in some market place.

Trying to rationalize the FCC's position, the dissent observes that the FCC must want to give the monopolistic local telephone companies more revenue now so that they can be aggressive in future non-regulated aspects of local service and any other businesses in which they can compete. See Judge Greene's decision strongly criticizing the Bell Operating Companies entrance into new businesses because it might interfere with their monopoly local exchange service, *United States v. AT&T, et al.*, C.A. No. 82-0192 slip opinion, entered on July 26, 1984, appeal docketed, No. 83-1865. The dissent observes that "monopoly should depend for its existence on serving all at reasonable rates and should not be permitted to become a financing tool for competitive ventures." 737 F.2d at 398. The dissent then concludes that if the FCC can preempt based on the rationale that telephone companies need more money to promote the competitive aspects of their businesses, the FCC has in effect preempted the entire ratemaking process. After all, the FCC's rationale is so broad that it could apply equally to intrastate depreciation rates, return on equity or any other rate element that makes up a telephone company's revenue requirement.

If the FCC can achieve preemption of state prescribed depreciation methods by reciting the shibboleth of encouraging competition with as little showing of federal-state conflict as it has made here, it has effectively written 47 U.S.C. Sec. 152 (b) and 221 (b) out of the Communications Act. It seems to me that any ratemaking changes that the carriers want can be adopted, if they persuade the FCC that they need

the money, for any FCC adoption may be imposed on the States by virtue of the Supremacy Clause on the ground that the resultant additional revenue will help the carriers in some theoretical way to compete in some market that need not even be specified, as it was not here. *The logical result of this decision is to permit the FCC to abrogate completely the state regulation of intrastate ratemaking for the carriers' intrastate operations in violation of the Communications Act.* (Emphasis added.)

737 F.2d at 398

**B. The FCC Cannot Use General Purpose Language in the Preamble of the Communications Act to Infer a Congressional Objective to Preempt State Regulation of Intrastate Communications When Other Parts of the Communications Act Explicitly Reserve Jurisdiction to the States**

To overcome sections 152(b) and 221(b)'s express reservations of state authority over intrastate communications<sup>10</sup> the FCC is reduced to relying on vague "purpose" language in the preamble of the Act which states that the FCC was formed to regulate interstate communications to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and worldwide wire . . . communication service . . .

47 U.S.C. Sec. 151.<sup>11</sup>

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<sup>10</sup>See Appendix B for specific language of 47 U.S.C. § 152(b) and 47 U.S.C. § 221(b).

<sup>11</sup>Also see *Capital Cities Cable Inc. v. Crisp* 467 US . . ., 81 L. Ed.2d 580, 104 S.Ct. 2694 (1984). This case holds that state action which bans out-of-state broadcast signals carried by cable operators is preempted by federal law. This Court upheld preemption because such state action violated 10 years of FCC regulatory activity and because the enforcement of such a ban would compel cable operators "to abandon altogether their carriage of both distant broadcast signals and specialized non-broadcast cable services or run the risk of criminal prosecution". (81 L.Ed at 598) This

This Court recently refused to infer a preemptive congressional objective from this type of "purpose language" when other parts of a federal statute explicitly give jurisdiction to the states. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, et al.* 461 U.S. 190 (1983). In that case it was argued that state law frustrated the Atomic Energy Act's purpose, the development of the commercial use of nuclear power. The Court found that, even though Congress' purpose was to develop nuclear power, the promotion of this purpose could not be accomplished "at all costs" when Congress had explicitly preserved state authority over other aspects of the planning, construction, and financing of nuclear power plants. General statements in federal statutes, although reflecting Congress' desire to encourage a certain activity, do not demonstrate a congressional intent to preempt all state actions that may have an adverse impact on that congressional purpose. Such an intent can only be inferred when the congressional intent to preempt is "unmistakably clear". *Pacific Gas & Electric Co. et al. v. State Energy Resources Conservation and Development Commission, supra*; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), citing *Florida Lime & Avocado Growers, supra*, at 142. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). *Arkansas Electric Cooperative Corp. v. Arkansas*

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Court then found such state action to be at odds with the FCC's regulatory goal of making available the benefits of cable communications on a nationwide basis. In the instant case the setting of intrastate depreciation rates has traditionally been a state function and if it continues to be a state function the FCC merely claims that there is a "possibility" that interstate services may be affected in an undefined manner.

*sas Public Service Commission, .... U.S. .... L.Ed....., 103 S.Ct. 1905 (1983)* When this test is not met "the legal reality remains that Congress has left sufficient authority in the states . . ." (emphasis added) 461 U.S. at 223.

In reaching this conclusion the Supreme Court carefully evaluated congressional intent and found that "[g]iven this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress." 461 U.S. at 223.

Similarly, in the instant case, although Congress sought in the Communications Act to encourage the development of a "rapid, efficient . . . communications service", 47 U.S.C. 151, this policy does not manifest any congressional intent—much less one that is "unmistakably clear"—to preempt state regulation of intrastate rates. See 47 U.S.C. 151(b) and 47 U.S.C. 221(b). To decide otherwise would preclude any meaningful state role in the regulation of intrastate communications.

As the legislative history plainly indicates, the Act was designed to preserve state authority over intrastate rates. When Congress was considering comprehensive communication legislation in the early 1930s, state representatives repeatedly urged that the new federal communications agency be denied the ability to adjust intrastate rates when there was an injurious effect on interstate traffic. *Shreveport Rate Cases: Houston, East and West Texas Railway Company v. United States*, 234 U.S. 342 (1914). The *Shreveport* holding was later codified in the Transportation Act of 1920, 41 Stat. 484. *Hearings on S.2910 Before the Senate Committee on Interstate*

*Commerce*, 73rd Congress, 2nd Session 153, 155, 178 (1934), Statements of Messrs. Clardy, McDonald and Benton); and *Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce*, 73rd Congress, 2nd Session 70, 134 (1934), (statements of Messrs. Benton and Clardy).

In the debates preceding the passage of the bill, these concerns were acknowledged by sponsors of the bill. Senator Dill, the Senate manager of the legislation, noted the intended effect of the restriction now codified in 47 U.S.C. § 152(b):

We have attempted in Title II to reserve to the State commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the *Shreveport* decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called "state regulation" amounts to very little.

78 Congressional Record 8823 (1934).

Congress thereafter passed the Communications Act, retaining Sections 2(b) and 221(b) of the Act, 47 U.S.C. §§ 152(b) and 221(b), which deny the FCC power to interfere with state regulation of rates and charges incident to intrastate communication service.

#### **C. Congress Has the Sole Authority to Rewrite the Communications Act**

By asserting that the "rapid, efficient" language gives the FCC the power to eliminate the authority reserved to the states in the Act, the FCC is challenging Congress' sole authority to create a regulatory scheme in the telecommunications area. The FCC, seeing an alleged administrative need to centralize policy decisions relating to competition

in the telecommunications industry, has chosen to bypass Congress and create a centralized regulatory structure by administrative fiat without statutory authority.<sup>12</sup>

Congress, well aware of the stresses and strains on the Communications Act's regulatory scheme in this new era of competition, has not changed the Act. Instead Congress has left the law alone and preserved the dual regulation of telecommunications.

Indeed "if the Commission believes it needs additional remedial power . . . it should seek such power from Congress. . . . [The courts are] no more authorized than is the Commission to rewrite the law." *Interstate Commerce Commission v. American Trucking Association, Inc.* ..... U.S. ...., .... L.Ed. ...., 104 S.Ct. 2458 (1984); see dissent. In failing to await congressional action, the FCC has acted as though "Congress needs . . . help from generous judicial implications to achieve the supersession of state authority"—despite the ability of "Congress [to] speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the states." *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947) (Separate opinion of Frankfurter, J., joined by Murphy and Rutledge, JJ.)

<sup>12</sup>In contrast, Congress has recently revamped the regulatory scheme for railroads and buses by giving the federal regulatory agency, the Interstate Commerce Commission, the authority to preempt state regulation to carry out the federal policy of promoting competition in those industries. See Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895); The Bus Regulatory Reform Act of 1982 (Pub. L. No. 97-261, 96 Stat. 1102). In both instances, Congress gave states the option to carry out federal policy. See 49 U.S.C. 11501, 49 U.S.C. 10935. Unlike Congress, the F.C.C., in the instant case, has given states no other option but to accept the FCC's specific rules and general policies. See *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982).

## II THE COURT SHOULD REVIEW THIS CASE BECAUSE IT CREATES A CONFLICT BETWEEN A DECISION OF A FEDERAL COURT OF APPEALS AND A STATE COURT OF LAST RESORT

The Supreme Court of Ohio has upheld the decision of the Ohio Public Utilities Commission to set intrastate rates based on its Commission depreciation methodology rather than one approved by the FCC. *Cincinnati Bell Telephone Company v. The Public Utilities Commission of Ohio*, 12 Ohio St. 3rd 280 (1984), appeal docketed, No. 84-623 (S. Ct. Oct. 16, 1984). The court agreed with the rationale of the court in *Southwestern Bell Tel. Co. v. Arkansas Public Service Commission* E.D. Ark March 30, 1984, 584 F.Supp. 1088,<sup>13</sup> when it quoted: "'Congress expressly limited the FCC jurisdiction, excluding regulation of intrastate communication. 47 U.S.C. Section 220(b).' "

The court went on to quote:

[I]n the light of the express FCC jurisdictional limitations imposed by Congress, the FCC's interpretation of expanding jurisdiction is a non sequitur. The logic of expanding into intrastate jurisdictional matters in the name of 'rapid, efficient, nationwide, world-wide wire and radio communication service with adequate facilities at reasonable charges' [47 USC 151] could, theoretically, allow the FCC to bootstrap itself into preempting all intrastate ratemaking determinations. 92 F.C.C. 2d at 876 (citing 47 U.S.C. Section 151). If the FCC wishes to have this authority, it should seek

<sup>13</sup>This decision was reversed by the Eighth Circuit in *Arkansas Public Service Commission v. Southwestern Bell Tel. Co.*, 738 F. 2d 901 (8th Cir. 1984), petition for cert. filed, No. 84-483 (S.Ct. Sept. 26, 1984).

express congressional approval. The Court finds the FCC preemption of intrastate depreciation methods to be ultra vires and will not enforce it for the plaintiff. (emphasis added)

This finding is in direct conflict with the holding of the Fourth Circuit in the instant case which held that the FCC does have the jurisdictional authority based on 47 U.S.C. § 151 of the Communications Act to preempt state agencies from prescribing depreciation rates for intrastate rate-making.<sup>14</sup>

### **CONCLUSION**

The decision below obliterates the distinction between what Congress may do and what a federal agency may do. Its affirmance of the FCC's preemptive order has sanctioned the creation of a new jurisdictional framework which lacks the requisite congressional approval and flies in the face of a contrary congressional mandate.

Petitioners therefore respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

JANICE E. KERR\*

General Counsel

J. CALVIN SIMPSON

Assistant General Counsel

GRETCHEN DUMAS

Principal Counsel

PEOPLE OF THE STATE OF

CALIFORNIA AND THE

PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

350 McAllister Street

San Francisco, CA 94102

\*Counsel of Record

Telephone : (415) 557-0470

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<sup>14</sup>Other than Ohio, several state commissions have also issued orders which failed to adhere to the FCC's depreciation decision. In nine of these cases the local telephone company brought an action against the state commission in the federal district court, under 47 U.S.C. § 401(b), seeking an injunction mandating compliance with the federal agency's decision. At least one U.S. Court of Appeals has vacated a district court-issued injunction. *New England Tel. & Tel. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984).

One case dealing with issuance of a 401(b) injunction mandating compliance with the FCC's decision is presently before this Court in the form of a petition for writ of certiorari. *Arkansas Public Service Commission v. Southwestern Bell Tel. Co.*, *supra*. An amici curiae brief in support of this petition was filed on October 26, 1984 by a group of thirteen state utility commissions, four consumer representatives and two national organizations. This brief discusses all pending actions against state commission in federal courts.

DAVID E. BLABEY  
 General Counsel  
 LAWRENCE G. MALONE  
 Counsel  
 DEPARTMENT OF PUBLIC SERVICE  
 OF THE STATE OF NEW YORK  
 Three Empire State Plaza  
 Albany, New York 12223

FRANK J. KELLEY  
 Attorney General  
 LOUIS J. CARUSO  
 Solicitor General  
 DON L. KESKEY  
 LEO H. FRIEDMAN  
 Assistant Attorney General  
 THE STATE OF MICHIGAN AND  
 MICHIGAN PUBLIC SERVICE  
 COMMISSION  
 1000 Long Boulevard, Suite 11  
 Lansing, Michigan 48910

LYNDA S. MOUNTS  
 CADWALADER, WICKERSHAM & TAFT  
 1333 New Hampshire Ave., N.W.  
 Washington, D.C. 20036  
*Of Counsel*

WILLIAM PAUL RODGERS, JR.  
 General Counsel  
 CHARLES D. GRAY  
 Assistant General Counsel  
 GENEVIEVE MORELLI  
 Deputy Assistant  
 General Counsel  
 NATIONAL ASSOCIATION OF  
 REGULATORY UTILITY  
 COMMISSIONERS  
 1102 ICC Building  
 Post Office Box 684  
 Washington, D.C. 20044

JOEL B. SHIFMAN  
 Attorney  
 PUBLIC SERVICE COMMISSION  
 OF WEST VIRGINIA  
 State Capitol  
 Charleston,  
 West Virginia 25305

JACK SHREVE  
 Public Counsel  
 OFFICE OF THE PUBLIC COUNSEL  
 202 Blount Street, Room 624  
 Tallahassee, Florida 32301

STEVEN W. HAMM  
 Consumer Advocate for the  
 State of South Carolina  
 RAYMOND E. LARK, JR.  
 Assistant Consumer Advocate  
 SOUTH CAROLINA DEPARTMENT  
 OF CONSUMERS AFFAIRS  
 2801 Devine Street  
 Columbia,  
 South Carolina 29250

**SUSAN W. RESTER**  
 Special Assistant  
 Attorney General  
**MINNESOTA DEPARTMENT OF**  
 PUBLIC SERVICE  
 1102 Bremer Tower  
 7th & Minnesota  
 St. Paul, Minnesota 55101

**DAVID LYNCH**  
 Assistant General Counsel  
**IOWA STATE COMMERCE**  
 COMMISSION  
 1350 New York Ave., N.W.,  
 No. 1023  
 Washington, D.C. 20003

**BRIAN MOLINE**  
 General Counsel  
**JAMES FLAHERTY**  
 Attorney  
**KANSAS STATE CORPORATION**  
 COMMISSION  
 State Office Building  
 Topeka, Kansas 66612

**HOWARD C. DAVENPORT**  
 General Counsel  
**LLOYD N. MOORE, JR.**  
**MOORE & HICKS**  
 1250 Eye Street, N.W., No. 201  
 Washington, D.C. 20005  
 Attorneys for Public Service  
 Commission of the District  
 of Columbia

**STEVEN SCHUR**  
 Chief Counsel  
**JON KINGSTAD**  
 Assistant Chief Counsel  
**WISCONSIN PUBLIC SERVICE**  
 COMMISSION  
 Post Office Box 7854  
 Madison, Wisconsin 53707

**ROBERT WALDRUM**  
 Attorney  
**ARKANSAS PUBLIC SERVICE**  
 COMMISSION  
 1000 Center  
 P.O. Box C-400  
 Little Rock, Arkansas 72202

**KENNETH O. EIKENBERRY**  
 Attorney General  
**LARRY V. ROGERS**  
 Assistant Attorney General  
**WASHINGTON UTILITIES AND**  
 TRANSPORTATION COMMISSION  
 Highways-Licenses Building  
 Olympia, Washington 98504

**IRWIN I. KIMMELMAN**  
 Attorney General of  
 New Jersey  
 By **ALAN S. PRALGEVER**  
 Deputy Attorney General  
 for the New Jersey Board of  
 Public Utilities  
 Division of Law  
 1100 Raymond Blvd., No. 316  
 Newark, New Jersey 07102

**JOSEPH I. LIBERMAN**  
**Attorney General**  
**WILLIAM B. GUNDLING**  
**Assistant Attorney General**  
**PETER J. JENKELUNAS**  
**Assistant Attorney General**  
**DEPARTMENT OF PUBLIC UTILITY**  
**CONTROL/STATE OF**  
**CONNECTICUT**  
**1 Central Park Plaza**  
**New Britain, Connecticut 06051**